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ABSTRACT

The issue of whether educators and the education profession can be held liable for professional judgments that result in the failure of students to succeed academically is addressed. An overview of past educational malpractice claims is presented, with an outline of the fundamental legal questions in several case histories. Judicial decisions in these cases are discussed and analyzed. The implications of increasing malpractice suits against educational institutions are considered. (JD)

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THE EDUCATOR AND THE LIABILITY LAW OF PROFESSIONAL MALPRACTICE: A HISTORICAL ANALYSIS

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Introduction

> The life of the law has been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed.[1]

> In recent years, education has been experiencing an identity crisis. Not least in helping redefine its identity have been the courts of the country. As one crisis after another has been brought to the courts for adjudication, successive rulings have left an unmistakable mark on students, faculty and administration.[2]

Within the past few decades, the Courts have had more and more influence on educational policies, practices and programs. Certainly, the most visible action of this period was the 1954 Supreme Court decision on segregation in Brown v. Board of Education.[3] But since then, the Courts have continued to make critical decisions on a range of issues affecting the public schools and institutions of higher education as well. The Courts, indeed, have begun to play a major role in determining what happens in educational organizations -- so much so, in fact, that a number of institutions have taken to retaining legal counsel.

The complete picture of the result of all this legal activity, however, is hazy for many, if not most educators. They see a portion of the picture, a line here, a stroke there, but never the entire canvas.

This increased involvement of the courts in education, an area they have traditionally been reluctant to enter, has caused many a teacher, administrator, and more recently researcher to express concern.

Historically the school remained the exclusive province of educators. The courts, though often called upon to review the legality of measures taken by students, teachers, counselors, administrators, and researchers, have been reluctant to invalidate the actions of school officials. The courts have, however, begun to challenge the decisions of educators who violate or fail to recognize the constitutional rights of students, and teachers.

While educators and the courts continue to wrestle with some of the complex issues that provide or hinder the equalizing of educational opportunity, other issues push to the front. Educational malpractice, or its threat, represents one such issue. At the center of this issue is the question of whether educators and the educational profession can be held liable for professional judgements that result in the failure of students to succeed academically. This professional judgement issue reached a crossroad in the 1970's. Declining student test scores and an apparent lessening of confidence in school officials contributed to the dilemma. The whole idea of educational malpractice represents a shift from issues of student care and safety to the educational outcome. Although the courts have yet to rule in favor of plaintiffs in malpractice suits involving educators, as they have in the medical and legal professions, litigation involving educators is certainly on the increase. During the last decade, almost every teacher and administrator has begun asking himself what educational malpractice means for the practicing educator.

Although the malpractice issue received great impetus from the medical and legal professions, other professions have since become emersed in this complex area. This has contributed to an increase in the number of lawsuits brought against educators.

Since educational malpractice is now a practical reality, I will speculate on the direction the courts will take in the area of educational malpractice. Finally, I plan to discuss the policy questions raised in various relevant lawsuits. Before discussing court cases concerning malpractice, however, I should review some of the issues related to the law of malpractice in general.

The Context

Historically, school litigation involving educators has centered on issues related to the care, safety and supervision of students. Educational malpractice, on the other hand, addresses actual instruction. Educators gnerally agree that proper instruction is their most important duty. By proper instruction, I mean that educators are understood to be responsible for instructing students in a manner that results in the mastery of particular skills.

The number of educational malpractice claims has increased during recent years, and many factors help explain this phenomenon: declining test scores; a loss of public confidence in the education profession and discontent over the judgements made by educators. Many of the "lawsuits filed address the responsibility of a school system to provide equal educational opportunity and to ensure that the rights of students are not violated in the process."[4] This increase in the number of lawsuits has also led to increases in the cost of educational malpractice liability insurance.

As a result of this growing phenomenon, educational administrators, researchers, scholars and lawyers have started to seek an understanding of

educational malpractice and the implications it has for those in the educational profession.

"The education malpractice suits are based mainly on common law."[5] [Such suits allege that school districts and officials are liable] for "damages if they fail to provide students with a proper education"[6] thus not fulfilling their statutory duty.[7]

The area of law that deals with substandard professional performance "is one branch of the law of torts."[8] With the rise of allegations concerning educational fraud, more attention has been given to "traditional torts precepts, especially negligence law and the notion of the 'reasonable man,' as the dominant theory of liability."[9] Such suits are actions at law in which an individual seeks a remedy for an injury (the loss of educational benefits) caused by the educator or school district. In educational malpractice suits three interested parties are generally involved:

1. The aggrieved student seeking redress for his alleged loss of education;
2. The school system or educator whose competence or judgement is being challenged; or
3. The general public.[10]

Therefore, educational malpractice . . . is a fault-based system.[11]

Before someone can be held liable for educational malpractice, the plaintiff must establish that the educator owed him a duty. "Duty" consists of two parts: the duty to perform, and the duty to perform in an acceptable professional manner. Two legal theories support the

existence of a teacher-client relationship. The first is contract theory, based on the situation in which an individual promises to provide specific services for a given fee, which gives rise to a contractual arrangement. Admittedly, such a relationship is more apparent at the collegiate level than the elementary and secondary school; but this is not to say that no duty is owed at the elementary and secondary levels, only that it is more difficult to prove the existence of a contractual agreement at these levels. The other theory may provide a clearer understanding of the basis for creating a teacher-client relationship. This theory states that "liability may result for substandard care where one undertakes to render services which he should recognize are necessary to protect the safety of another, and his failure to exercise due care increases the other's risk of harm or the harm is suffered because the other relied upon the undertaking.[12] Professional malpractice law, weighing variations of these two theories, has already become a discrete specialized legal field.

Although we have reason to recognize that a sort of contractual relationship does exist between educators and students in certain instances, a plaintiff always has the obligation to establish that a defendant-educator's professional competence or judgement was below an acceptable level. This level, or "standard of care," is that established by peers in the educational profession -- the yardstick being what an "average" colleague would have done in the same or similar circumstances. To establish that an individual has been negligent, there is a need to establish:

1. that the educator owed a duty to the student;
2. that an appropriate standard of care had been breached;
3. the existence of a compensable injury; and
4. that there was a connection between violation of the standard of care and the resultant injury.[13]

Generally speaking, the burden of proof -- of establishing the existence of these four criteria -- rests with the party seeking relief, the plaintiff. "It is the standard of care that most animates the law of [educational] malpractice and is probably the most crucial element in any malpractice claim based on negligence."[14]

It is important to note that some circumstances differentiate educational malpractice from the other forms of professional malpractice.

1. Medical "illness" can usually be defined with some precision; consensus can be achieved regarding what constitutes a broken arm or a cancerous tumor. This is not the case, however, when educators are asked to define functional illiteracy.

2. Medical malpractice suits hold doctors accountable to "accepted practice." Generally, there are estaglished practices for remedying particular conditions. But in education, few such practices or procedures are rigorously standardized.

3. In medicine the treatment is usually administered by a single individual within a fixed, usually short, period. In education, many persons with varying degrees of authority participate in a fragmented process, and are responsible in varying degrees for the success or failure of a child's education.

4. The patient is usually passive in medical treatment, and the doctor generally bears sole responsibility for the results. Education, on the other hand, is an interactive process--the child is expected to participate and indicate when he is experiencing difficulties, and the parents are expected to participate too.[15]

5. Unlike a patient, students up to a certain age are compelled to attend schools and participate in prescribed courses.[16]

Despite education's unique professional circumstances, however, we can expect more and more lawsuits questioning the extent to which members of the profession have performed below some expected standard of care. This litigation should produce more prudent educational decision-making. And this caution may create other problems for those who are most reluctant to make decisions for fear of becoming emboiled in a lawsuit.

What relief can be sought by someone discontent with an educator's judgement or with the failure of a student to benefit from competent instruction? Three different kinds of relief already exist for those discontent with the standard of educational care provided by a school district or its personnel: A plaintiff might seek (1) the removal of an incompetent teacher (and replacement with a competent teacher); (2) the provision of,or payment for, remedial instruction; and (3) monetary compensation for diminished future income.[17]

Intentional misrepresentation may provide another area through which a plaintiff can seek remedy. Assume a student receives good to excellent grades in a subject area he or she knows little if anything about. Furthermore, assume that the teacher is aware that all available data indicates the student's inability to perform successfully in that particular discipline. Assume that the parents try to determine whether their child is functioning up to his or her potential and the teacher reassures them that no further assistance is necessary.

The aforementioned example could well constitute the element required for a tort action in deceit. These elements include:

1. A false representation made by the defendant;
2. The knowledge or belief on the part of the defendant that the representation is false or, what is regarded as equivalent, that he has not a sufficient basis of information to make a decision;
3. An intention to induce the plaintiff to act or to refrain from action in reliance upon the misrepresentation;
4. A justifiable reliance upon the representation on the part of the plaintiff, in taking action or refraining from it; and
5. Damage to the plaintiff resulting from such reliance.[18]

A school district may also be liable for the negligent acts and omissions of its employees under the doctrine of respondeat superior.[19] "The doctrine of respondeat superior may be invoked to render the school district liable for the negligence of its officials in hiring an incompetent teacher"[20] or, presumably, for an action by an educator that results in a student's loss educationally.[21]

The Cases

Oddly enough, educational malpractice cases are not entirely new. In this section I plan to review those court cases in education concerned with the issue of educational malpractice.

The first case concerned with educational malpractice dates back to 1957 when Roy G. Jacobsen,[22] a student, was sued by Columbia University for two notes totaling $1,049.50 for the balance of tuition owed the University. Jacobsen, however, sought to recover only $1,000 of that owed. The defendant then filed a counterclaim demanding $7,016 in monetary damages.

The countersuit was based on 50 allegations that the plaintiff had promised to teach the defendant "wisdom, truth, character, enlightenment, understanding, justice, liberty, honesty, beauty, and similar virtues and qualities; that it would develop the whole man, maturity, well-roundedness, objective thinking, and the like; and that because it had failed to do was guilty of misrepresentation."[23] (Jacobsen claimed Columbia had failed to carry out its promises and had thus committed fraud.) The allegation was based on quotations from University brochures and catalogs, inscriptions over its buildings and statements made by its officials.[24] It is important to note that the defendant denied any counts alleged in the countersuit.

In reviewing the case, the court found that the plaintiff had entered Columbia University in the fall of 1951 following a successful year at Dartmouth. He had remained at Columbia until the completion of his senior year, but did not graduate because of poor scholastic standing. According to the record, the defendant's professional aspirations changed several times during the time he spent in college. For example, "his interest changed from civil engineering to social work, then to physics, and finally to English and creative writing."[25] While in college he became critical of his professors and his courses. In his senior year he attended only the classes of his choosing and failed to complete course requirements such as term papers and "regimen examinations." When questioned about his poor work and failure to attend class he responded in a lengthy letter that "I want to learn, but I must do it my own way. I realize my behavior is non-conforming, but in these times when there are so many forces that demand conformity I hope I will find Columbia willing to grant some freedom to a student who wants to be a literary artist."[26] According to Judge Goldman,

speaking for the court, the defendant "chose to [evaluate] Columbia's educational system by the shifting standards of his own fancy,"[27] and now seeks to blame Columbia for his own inadequacies on the basis that it had intentionally misrepresented that it taught wisdom."[28]

The court ruled that the defendant had failed to state a cause of action in deceit based on fraudulent representation. Therefore, the trial court granted a motion for summary judgement which was sustained on appeal.[29]

In 1973, a suit[30] was filed on behalf of Peter W. against the San Francisco Unified School District, its officers, agents, and employees, seeking to recover damages for alleged intentional misrepresentation, negligence and a violation of statutory and constitutional duties owed to students and parents. This was to be the first lawsuit in which a plaintiff sought restitution in the form of monetary damages for "what is unquestionably one of the most fundamental necessities . . . the ability to read and write."[31]

Peter W., the plaintiff, graduated from high school in 1972. Although school records indicated him to be of average intelligence or better, he left high school with a fifth grader's reading ability. As a student, the plaintiff had attended school regularly and received average grades. He had never been involved in a serious disciplinary altercation. During the time he was enrolled in public school, Peter's parents frequently sought to determine how their son was progressing academically. They were frequently assured that Peter was performing on or near grade level "in basic skills such as reading and writing . . . and needed no special or remedial assistance.[32]

After graduation two reading specialists examined the plaintiff at the request of his parents. The specialists agreed that Peter was functionally

illiterate and read and wrote approximately on the fifth grade level. Completing an application for a job was too difficult for him. His reading and writing ability was so limited that he was "unqualified for any employment other than . . . labor which requires little or no ability to read or write . . ."[33] Furthermore, Peter's inability to read and write had caused him mental strain and pain. Following the examination by the reading specialists, Peter received private tutoring which advanced him two grade levels over an eight-month period.

These facts provided the basis for the complaint filed against the San Francisco School District. The plaintiff contended that the school system had "failed to use reasonable care in the discharge of its duties to provide plaintiff with adequate instruction, guidance, counseling and/or supervision . . . and to exercise that degree of professional skill required of an ordinarily prudent educator."[34] Specifically, the complaint alleged that the school system negligently and carelessly

1. failed to take notice of plaintiff's reading disabilities;
2. assigned plaintiff to classes where the books and other materials were too difficult for a student of plaintiff's reading ability to read;
3. allowed plaintiff to pass and advance from a course or grade level although the defendants knew or, with the exercise of reasonable care and skill, should have known that plaintiff had not achieved the knowledge, understanding, or skills required for completion of said course or grade level and necessary for him to succeed or benefit from subsequent courses;

4. assigned plaintiff to classes with instructors not qualified or unable to teach the particular subject, and classes not geared towards students with his reading abilities and disabilities; and
5. permitted plaintiff to graduate from high school although he was unable to read above the fifth grade level.[35]

The complaint further contended that except for the failure of the school system, Peter W. would have graduated from high school reading on the eighth grade level; therefore, the plaintiff sought $500,000 in damages.

The Superior Court of California ruled that mere educational failure was not an "injury" within the meaning of tort law.[36] The Court dismissed the suit on these three grounds: First, the State's sovereign immunity shielded its officers, agents, and employees from liability for injury resulting from negligence.[37] Second, it violated public policy to hold a school district accountable for a "duty of care in the discharge of its academic functions."[38] Third, "since there exist no readily acceptable standards with regard to classroom methodology, what constitutes accepted practice in the science of pedagogy cannot be settled."[39]

Another suit which however did not finally go to court, concerned a student attending the University of Bridgeport.[40] This student, a Mrs. Ianniello, claimed the Methods and Materials in Teaching Basic Business Subjects course in which she had been enrolled was of no value. Mrs. Ianniello further argued that what was taught was not what was described in the University's catalog. She sued the university for $400 in damages.

In another case, involving George Washington University, a student alleged that a course in landscape architecture actually taught students "how to trace someone else's blueprints.[41] This case was settled out of court.

In yet another case, the plaintiff, Edward Donohue,[42] filed charges of educational malpractice and breach of statutory duty against the Copiague Union Free School District in New York City. After receiving failing grades in several courses, Edward had graduated from high school without possessing basic reading or writing skills. In addition, he had no understanding of the other courses taught in high school. He subsequently obtained the services of a tutor in an effort to acquire the skills he needed to function in society.

The plaintiff further alleged that the defendant school district, its officers and employees had breached their duty by failing to

1. evaluate his mental ability and capacity to comprehend what was being taught;
2. be as reasonable and prudent as they should have been under the circumstances;
3. interview, discuss, evaluate and/or test to ascertain his ability to comprehend and understand subject matter;
4. provide facilities, employees and support personnel trained to ascertain his intellectual capability;
5. hire personnel skilled and experienced in such matters;
6. utilize appropriate teaching techniques and strategies;
7. provide adequate supervision;

8. keep his parents informed of the instruction difficulty and need for psychiatric assistance; and
9. "adopt the accepted professional standards and methods to evaluate and cope with [his] problems which constituted educational malpractice."[43]

The second cause of action alleged by the plaintiff asserted that the defendant had a duty under Section 1 of Article XI of the New York State Constitution to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."[44] The plaintiff claimed that although public schools were operating, the defendant failed to educate him. Relying on the Peter W. case the court dismissed this complaint for failure by the plaintiff to state a cause of action.[45]

As matters stand now, those who enter claims alleging negligence or so-called educational malpractice, can expect no recovery unless (1) the defendant owed plaintiff a duty of care, (2) the defendant failed to discharge that duty, and (3) the plaintiff was injured as a result of said failure.[46] Negligence, here, apparently does not exist unless there is a corresponding duty and right between the defendant and plaintiff, respectively. "Judicial recognition of the existence of a duty of care is dependent upon principles of sound public policy and involves the consideration of numerous relevant factors"[47] including

1. moral considerations arising from the view of society toward the relationship of the plaintiff and defendant;
2. preventative considerations which involve the ability of the defendant to adopt practical means of preventing injury;

3. economic considerations, which include the ability of the defendant to respond to damages;
4. administrative considerations, which concern the ability of the courts to cope with a flood of new litigation.[48]

Upon examination of whether the defendant had a duty of care to the plaintiff, the New York Court concluded, like the Court in Peter W., that no such duty existed.[49] The Court went on to say in dicta that educators are obligated to provide meaningful public education and may be liable for a breach of duty. "It does mean, however, that they may not be sued for damages by an individual student for an alleged failure to reach certain educational objectives."[50] The Court further stated that courts were not the proper forum to test the effectiveness of educational programs and practices.

Justice Suozzi, dissenting against the dismissal of the complaint, suggested that the defendants were responsible for maintaining a duty of care.

In Hoffman v. Board of Education [51] actual negligence was proven to a jury. At the age of five, the plaintiff, who had a speech defect, was administered an I.Q. test. The test was primarily and the plaintiff received an I.Q. score of 74. No attempt was made to inform his mother of this diagnosis of retardation, which based on his falling short of the cut-off score of 75. He was subsequently placed in a class for the mentally retarded. It is important to note that the year before, the plaintiff scored an I.Q. of 90 on a non-verbal intelligence test. The doctor who administered the test on which the plaintiff scored a 74 was not convinced

of the accuracy of the plaintiff's score, therefore, he recommended that the plaintiff be retested in two years and receive speech therapy. But it was not until he was eighteen, some thirteen years later, that he was retested. On that test he scored an I.Q. of 94. Because his score was higher than the 75 cut-off, he could no longer remain in special education where he had been for 12 years.

The failure of the defendant to follow the recommendation of the board's school psychologist that the plaintiff be re-evaluated within two years constituted the act of negligence. The defendant claimed that despite the delay in the retesting and despite his placement in a class for the mentally reatrded, the plaintiff had received a sound education. The jury hearing the case ruled in favor of the plaintiff and awarded him $750,000 which was subsequently reduced to $500,000 in damages. The defendant has filed an appeal.

Justice Damiani dissented. He felt that the complaint should have been dismissed since no cause of action for education malpractice existed in the State of New York. Damiani relied on the ruling in the Donohue case in which the same Court had cited the strong public policy of New York to avoid judicial intrusion into educational matters. Furthermore, Damiani expressed an unwillingness in this case, to question the judgement of educators.[52]

The ruling in the Peter W. case served as a precedent for a similar decision in the Donohue case. What is interesting about both these cases is that although the parent(s) of the plaintiff were repeatedly either misled or avoided by school officials the courts dismissed the claims against

the defendants. Justice Suozzi's dissent in Donohue, however, provides some insight into the reasoning of the Supreme Court of New York's decision on behalf of the plaintiff in the Hoffman case. In Hoffman the Court ruled a board of education was responsible under rule of respondeat superior for negligence. Thus, it had a duty to carry out the recommendation of a school psychologist for retesting the plaintiff within two years. This decision resulted in damages being awarded to the plaintiff. The Hoffman case is being appealed, there is no way to determine whether it will be sustained. I am convinced, however, that this decision will provide the basis for future rulings on behalf of those raising the issues of fraud or misrepresentation against the public schools and their employees.

Professional Negligence: Implications for Educational Administrators, Evaluators and Researchers

Except for the ruling in Hoffman, the courts have consistently dismissed claims against educational organizations, their agents, and employees. But there is reason to believe that society and the judicial system are ready for a change. The arguments presented by the courts in the Peter W. and Donohue cases that "physical, neurological, emotional, cultural and environmental factors beyond the defendant's control may have had more influence on the plaintiff's learning than the instructional program, may be less acceptable to the courts."[53] This possibility becomes more real as the court moves from reliance on the hypothetical concept of a reasonable man to a "test for a professional [which is] whether he exercised the reasonable

care and the measure of skill and knowledge ordinarily possessed and exercised by members in good standing of his profession. . . .[54]

I agree that no empirical evidence dictates the most effective teaching method and technique in any individual case for any particular learner. Likewise, there is no way to determine when the judicial system and educators themselves will finally accept the fact that a professional educational standard of care must be maintained. I do not agree with those who say that such a standard will inevitably produce a flood of litigation. Nor am I convinced that the threat of educational malpractice will deter incompetents from entering the education profession. But, it may encourage educators to utilize those techniques and strategies commensurate with sound educational practice. Meanwhile, educators must take steps to change the perception that "the science of pedagogy itself is fraught with different and conflicting theories of how or what . . . should be taught.[55] Although the New York Court asserted that there was no way within the meaning of tort law to measure the extent to which student injury was due to external factors as opposed to the failure of school personnel to carry out their duty,[56] that "way" may soon be found. This fact suggests a need for more studies on the effects of schooling.

In short, we must devote attention to what we must do to move education to professional status in the eyes of the law.

Conclusion

It may not be much help to say so, but the future of the educational malpractice concept is hazy. Nevertheless, educational researchers should continue to examine the effect of schooling on student learning. If

researchers and other members of the education profession do nothing to improve the knowledge base in this area, such external forces as the legislature and the courts, through statutes and judicial decisions, will eventually establish guidelines for educators, and all of society will suffer the resulting in flexibility.

As they make errors in judgement educators will increasingly assume defensive postures as they attempt to prove that their actions do not violate a student's constitutional and statutorial rights. This pressure will almost certainly increase, simply because the educational community will find itself caught between all "product liability" concept, on one hand, and a growing number of vocal parents dissatisfied with some aspect of an instructional program or a particular employee, on the other. The litigiousness in society has already expanded the market for professional liability insurance.

I hope that this oversimplified discussion makes it clear that the complexities of educational malpractice are such that no easy answer exists. I am convinced, however, that it is better to develop rules than be ruled.

NOTES

1. Oliver W. Holmes, Jr. The Common Law. Boston: Little, Brown and Company, 1881, p. 1.

2.

3. 347 U.S. 483 (1954)

4. Joan C. Baratz and Terry W. Hartle,"Malpractice in the Schools," The Progressive, 41, Juen, 1977, p. 33.

5. Ibid.

6. Ibid.

7. Ibid.

8. Sylvia Law and Stephen Polan, Pain and Profits: The Politics of Malpractice, Harper & Row: New York, 1978, p. 1.

9. Joseph H. King, Jr.,The Law of Medical Malpractice, West Publishing Co., St. Paul, Minn. 1977, p. 2.

10. Law and Polan, loc. cit., p. 3

11. Ibid, p. 5.

12. Restatement, Second, Torts § 323 (1965).

13. King, loc. cit., p. 37.

14. Ibid.

15. Boratz and Hartle, loc. cit., p. 34.

16. Ibid.

17. _____ "Educational Malpractice," University of Pennsylvania Law Review, 124, 1976, p. 757.

18. W. Prosser, Handbook of the Law of Torts, 685-6, 4th Ed. 1971.

19. Educational Malpractice, loc. cit., p. 769.

20. Ibid.

21. Ibid.

22. Trustees Of Columbia University v. Jacobsen, 148 A. 2d 63 (1959).

23. Id. at 64

24. Id. at 65

25. Id. at 66

26. Id. at 67

27. Id.

28. Id. at 67

29. Id.

30. First Amended Complaint at 1-2, Doe v. San Francisco Unified School District, hereafter cited as Peter W., Civil No. 653-312 (Sup. Ct. of San Francisco, Cal. filed October 31, 1973) [hereafter cited as Plaintiff's Complaint], appealed 60 Cal. App. 3d 814, 131 Cal. Rptr. 854 (1976).

31. Id.

32. Id. at 826

33. Id. at 817

34. Id.

35. Id., First Amended Complaint at 6-8.

36. Doe, supra note 30 at 855.

37. Id. at 861-2

38. Id.

39. Richard E. Fields and J. John Harris, "Educational Malpractice and The Public Demand for Teacher Accountability," Planning and Changing, Spring, 1978, p. 12.

40. _____ Suing for Not Learning, Time, March 3, 1975, p. 73.

41. Baratz and Hartle, loc. cit., p. 34.

42. Donohue v. Copiague Union Free School, 407 N.Y.S. 2d 874 (1978).

43. Id. at 877

44. Id. at 874

45. Id.

46. Id. at 877

47. Id.

48. Id.

49. Id. at 878-9

50. Id.

51. 410 N.Y.S. 2d 99 (1978)

52. Id. at 117

53. Peter W. and Donohue, supra notes 30 and 42 at 854 and 874.

54. John Elson, "A Common Law Remedy for the Educational Harms Caused By Incompetent Or Careless Teaching," Northwestern University Law Review, 73, November, 1973, p. 698.

55. 60 Cal. App. 3d, 823-4.

56. Id. at 823